

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of)
Section 302 of the)
Telecommunications)
Act of 1996)

Open Video Systems)

CS Docket No. 96-46

COMMENTS OF TELE-COMMUNICATIONS, INC.

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April 1, 1996

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COMMENTS OF TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI"), by its attorneys, hereby submits these Comments in response to the Commission's Notice of Proposed Rulemaking in the above captioned proceeding.^{1/}

INTRODUCTION

In the Telecommunications Act of 1996,^{2/} Congress established the statutory framework for open video systems ("OVS") in an effort to promote "vigorous competition in entertainment and information markets."^{3/} An integral part of that framework is the development of rules and policies that prevent a local exchange carrier from constructing or

^{1/} In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, CS Docket No. 96-46, Report and Order and Notice of Proposed Rulemaking, rel. March 11, 1996 ("NPRM").

^{2/} Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

^{3/} See H.R. Rep. No. 458, 104th Cong., 2d Sess. 178 (1996) ("Conference Report").

operating open video systems in a manner that harms telephone ratepayers or undermines competition from other multichannel video programming distributors ("MVPDs"). This proceeding is about the creation of ground rules to ensure that open video systems can compete fairly in the video marketplace.

Fundamental to fair competition is the establishment of clear, readily-enforceable cost allocation rules. Local exchange carriers ("LECs") providing OVS will have strong incentives to shift costs from OVS to regulated telephone service.^{4/} The Commission has the duty under the 1996 Act^{5/} and Title II^{6/} to ensure that consumers do not unfairly subsidize telephone company rollout of new video services.

The Commission must also ensure that OVS operators adhere to the 1996 Act's requirement of non-discrimination and parity with other MVPDs. These principles apply not only to the offering of capacity to programmers, but to such matters as the allocation of bandwidth to affiliated and unaffiliated information providers, channel sharing, and marketing. To deter anti-competitive conduct, the Commission should require local exchange carriers to establish an arm's-length separate affiliate for its OVS activities.

Given the compressed time frame for reviewing OVS certifications, the Commission should also impose and strictly enforce a letter-perfect requirement on applicants. Without

^{4/} See, e.g., Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244, 344 (1995) ("Video Dialtone Reconsideration Order"). These incentives have not changed despite the repeal of the video dialtone regulations.

^{5/} Sec. 302(a) (to be codified at 47 U.S.C. § 573(b)(1)(A)) (noting that OVS "rates . . . shall be just and reasonable").

^{6/} See 47 U.S.C.A. §§ 201(b), 202(a) (1991).

such a threshold standard, the certification process will be utterly pointless and local exchange carriers will be able to move into OVS without any advance oversight.

Finally, the Commission should ensure that OVS meets the Congressional objective to provide new program offerings and expanded competition by making OVS truly "open" to cable companies and their programming affiliates. Denying any party the ability to compete in this new arena would be contrary to the letter and spirit of the Act.

I. THE COMMISSION MUST REQUIRE REGULATED LOCAL EXCHANGE CARRIERS FAIRLY AND PROPERLY TO ALLOCATE THEIR COSTS

A local exchange carrier offering video programming over its own facilities cannot be allowed to subsidize its new venture and thus obtain an anti-competitive advantage in the market.^{7/} To prevent this outcome, the Commission must prescribe cost allocation procedures to segregate the common costs and overhead costs of providing video and telephone services over the same facilities as a precondition to the rollout of any open video systems. It is not sufficient to defer action on cost allocation for another day. Such action is compelled by the 1996 Act, which requires OVS rates to be "just and reasonable,"^{8/} and by the Commission's rules, which demand that a LEC's regulated services not bear the costs of its unregulated ventures.^{9/} Failure to act on these matters in a timely fashion will undermine the robust competition Congress envisioned when it created OVS.

^{7/} See 47 U.S.C. § 573(b)(1)(A).

^{8/} 47 U.S.C. § 573(b)(1)(A). The requirement for "just and reasonable" rates is satisfied only if rates reflect the costs of building and operating OVS facilities.

^{9/} 47 C.F.R. § 32.23.

From its earliest inquiry in the video dialtone proceedings, the Commission has recognized that telephone companies have the incentive and ability to engage in potentially anticompetitive activities while rolling out video services.^{10/} Nevertheless, the Commission chose not to implement cost allocation safeguards for video dialtone, instead relying on telephone regulations and the Section 214 certification process.^{11/} This piecemeal approach proved to be a failure.^{12/}

Record evidence and experience suggest that the commingling of video costs with telephony service costs is likely to occur with respect to OVS.^{13/} The Commission appropriately recognizes that local exchange carriers should be required to allocate those costs pursuant to Part 64,^{14/} but Part 64 without modification is insufficient to prevent the cross-subsidization of OVS. Cost allocation manual ("CAM") filings pursuant to Part 64 were not designed to provide the Commission and interested parties with detailed information

^{10/} See Telephone Company-Cable Television Cross Ownership Rules, 2 FCC Rcd 5092, 5093 (1987) (noting the danger of "imposing added costs on the monopoly ratepayer by cross-subsidizing . . . new broadband services.").

^{11/} See Telephone Company-Cable Television Cross-Ownership Rules, 7 FCC Rcd 5781, 5827 (1992).

^{12/} For example, the Commission's decision in the Application of New Jersey Bell Telephone Company, 9 FCC Rcd 3677 (1994) avoided addressing any of the allocation problems raised in the Dover application. The Commission did not require any showing that video dialtone revenues would cover the total costs of providing video dialtone service.

^{13/} See Price Cap Performance Review for Local Exchange Carriers; Treatment of Video Dialtone Services Under Price Cap Regulation, 10 FCC Rcd 11098, 11102 (1995) ("In our view, the record in this proceeding does not demonstrate that LEC productivity gains in the provision of video dialtone service will equal or exceed historic productivity in the provision of telephony.").

^{14/} 47 C.F.R. §§ 64.901(a), 64.903(a), (c).

regarding all of the LEC's costs. Indeed, the CAM rules do not require carriers to submit actual cost information as part of their filings, but instead require only a brief narrative description of the regulated and non-regulated services and supplies provided between the carrier and its unregulated affiliates and the allocation method utilized.^{15/} Without cost data, including the cost studies used to develop the data, there is no legitimate opportunity to uncover carrier subsidization of the costs of deploying video services with funds from regulated services.^{16/}

It would be impractical, however, to conduct a case-by-case evaluation of each proposed OVS system to ensure that the costs are appropriately allocated between telephone and video services. First, such an evaluation would consume substantial Commission and public resources as parties raised conflicting claims about the adequacy of the local exchange carrier's cost allocation choices. Second, given the abbreviated period for reviewing an OVS certification,^{17/} such an evaluation would have to be completed prior to the submission of

^{15/} 47 C.F.R. § 64.903.

^{16/} The unique ability and incentive of local exchange carriers to engage in cross-subsidization derives from their regulation under rate-of-return and their control over essential bottleneck facilities. By shifting costs from unregulated to regulated businesses, the rate-of-return company reduces the costs of its unregulated service while increasing the rate base on which it is permitted to earn a return. See, e.g., Roger G. Noll and Bruce M. Owen, "The Anticompetitive Uses of Regulation: *United States v. AT&T*," in The Antitrust Revolution 290, 295-326 (J. Kwoka & L. White, eds. 1989). This is both anti-competitive and injurious to ratepayers. The adoption of price caps has not solved this fundamental problem. Price caps, as they exist and are foreseen to continue, do not totally divorce prices from costs. If profits are high, regulators will be under pressure to revise the price cap formula downward. As implemented, price cap regulation is really rate-of-return regulation with a time lag. See Declaration of Leland L. Johnson, Ph.D., attached to Comments of the National Cable Television Association, CS Docket No. 96-46 (Apr. 1, 1996).

^{17/} 47 U.S.C. § 573(a)(1).

an OVS certification, delaying the implementation of any OVS proposal. There will be no meaningful opportunity to conduct such an evaluation review after the certification was filed. Finally, as the video dialtone experience demonstrated, there are no standards for distinguishing the joint and common costs of a broadband network from costs that can be directly attributed to telephony or video. There is every reason to believe that the disputes on this point will recur in OVS.

Rather than proceed case-by-case, the Commission should immediately commence a proceeding to identify an appropriate allocator for separating the costs of OVS facilities between telephony and video services. A "gross" allocator^{18/} would assign a minimum percentage of LEC network rebuild costs to video and the remainder to telephone services.^{19/} Alternatively, the Commission could review proposed OVS architecture and devise one allocator for separating direct and common costs and another for assigning joint and common costs to telephone and video.^{20/}

^{18/} The current rules require that each service offering must be assigned its attributable cost plus a share of its common costs. After attributable costs are estimated, common costs are allocated to each service in proportion to directly attributable costs. Thus, any underestimation of attributable costs has an exaggerated effect on cost allocation. A "gross" allocator, applying to both attributable and common costs, would address this deficiency in the current cost allocation rules and moot any disagreement about the proper separation of direct and common costs.

^{19/} Cox Enterprises, Inc. suggested the so-called "50/50" allocator in the video dialtone context. Opposition to the Bell Atlantic Direct Case, CC Docket No. 95-145 (Nov. 30, 1995). The "50/50" allocator represents an obvious compromise.

^{20/} To avoid mis-allocation of joint and common costs, the Commission can and should adopt a rule of thumb to govern their assignment. Such a rule is particularly appropriate in this context because there is no economically "correct" basis for assigning these costs. Rather, assignment should advance such policy goals as the encouragement of fair competition in the video services marketplace and ratepayer protection.

(continued...)

Even with a bright-line test for allocating costs, there would be insufficient time during the ten-day certification period to ensure compliance with cost allocation rules. Fortunately, the statute does not require the Commission to do so. As the Commission recognizes, there are "steps that local exchange carriers must take prior to certification with respect to establishing cost allocation procedures between regulated and unregulated services."^{21/} Establishment of cost allocation rules and a carrier's demonstration of compliance are matters applicable to the regulated carrier and not to OVS,^{22/} and they can and must occur outside the OVS certification process if they are to be effective.

II. OPEN VIDEO SYSTEMS MUST BE IMPLEMENTED IN A NON-DISCRIMINATORY MANNER

A. THE COMMISSION MUST GUARD AGAINST DISCRIMINATION BY OVS OPERATORS

1. The Commission must define "affiliate" in a manner that gives meaning to any non-discrimination rules

As a threshold matter, the test of reasonable non-discrimination rules is the definition

^{20/} (...continued)

To the extent the Commission permits local exchange carriers to allocate a disproportionate share of joint and common costs to telephony, it would effectively be requiring ratepayers to shoulder the costs to the carrier's investment in broadband plant. Such a result is precluded by section 254(k) of the Communications Act, added by the 1996 Act, which bars a telecommunications carrier from "us[ing] services that are not competitive to subsidize services that are subject to competition." 47 U.S.C. § 254(k).

^{21/} NPRM at ¶ 70 (emphasis supplied).

^{22/} By the same token, the statutory proscription on applying title II to the establishment of open video systems does not preclude the Commission from continuing to apply accounting and other title II safeguards to carriers' regulated businesses in order to prevent anticompetitive abuses of their monopoly power. 47 U.S.C. § 573(c)(3).

of an "affiliate."^{23/} Define this term too narrowly, and a LEC will be able favor video programming providers ("VPPs") with whom it has a close relationship without violating the statutory proscription on discrimination. To avoid this result, the term should be defined to include entities who have any financial or business relationship with the OVS operator, whether by contract or otherwise, directly or indirectly other than the carrier-user relationship.^{24/} This definition would encompass the existence of any ownership or financial interest, affiliation, contingent interest, or other agreement.

Such a definition would capture all relevant relationships between the LEC and users of its OVS facilities.^{25/} The Commission has seen repeatedly that local exchange carriers are prone to establish relationships with certain video programmers at less than arms' length.^{26/} Given the incentive to discriminate, and the history of discrimination in the

^{23/} This definition cannot be postponed to a later date. See NPRM at ¶ 9 n.28 (postponing until "Cable Reform" rulemaking the definition of "affiliate" in the Title VI context).

^{24/} Cf. 47 C.F.R. § 63.08(e).

^{25/} The proposed definition is fully consistent with the 1996 Act. While the new law adds a general definition of affiliate to Section 3 of the Communications Act that hinges on a 10 percent equity ownership interest, the general definitions apply "unless the context otherwise requires." 47 U.S.C. § 153(33). The 1996 Act did not change the special definition of affiliate applicable to Title VI, which does not reference any particular ownership interest but speaks in terms of "ownership or control." Id. § 522(2). Thus, the Commission remains free to fashion various applications of this term appropriate to the particular policy goals at issue in a particular context.

^{26/} See, e.g., Application of SNET for Approval to Conduct a Dial Tone Transport and Switching Marketing Trial, Connecticut Department of Public Utility Control, at 14-15 (June 30, 1995) (finding that SNET's allocation of 49 of 53 available channels to a single programmer caused capacity problems); In the Matter of New Jersey Bell Telephone Company, File No. W-P-C 6840, 9 FCC Rcd 3677, 3680 n.44 (1994) (favored programmer allocated 60 of 64 available channels); "Pacific Bell Signs First Video Programmer," Connections, Aug. 1, 1994 (noting favored relationship). Such relationships were formed
(continued...)

supposedly more regulated environment of video dialtone, it is essential to enforce such a definition.

2. Marketing activities should not be used to discriminate against competing programmers and video programming providers

Congress directed that OVS operators should be prevented from using their marketing activities to discriminate against competitors.^{27/} The Commission must therefore establish clear rules with respect to the joint marketing of OVS and voice telephony services by LECs. Because of the dangers of discrimination inherent in telephone company marketing of regulated and unregulated services together, the Commission should prohibit such activities by an incumbent LEC unless certain safeguards are in place.^{28/}

In its Sales Agency Order, the Commission allowed the regional Bell Companies to refer customers to their own affiliated organizations, provided that the contact person informed customers that the equipment or services could also be obtained from other vendors.^{29/} The Commission recognized that only with such safeguards would marketing arrangements enhance competition for video services and increase consumer convenience.

^{26/} (...continued)

notwithstanding the fact that the carriers were required to act as indifferent providers of a video transmission conduit. See Nat'l Cable Television Ass'n v. FCC, 33 F.3d 66, 71 (D.D.C. 1994).

^{27/} 47 U.S.C. § 573(b)(1)(E) (forbidding discrimination with regard to "material or information (including advertising) provided by the operators to subscribers for the purposes of selecting programming on the open video system, or in the way such material or information is presented to subscribers.").

^{28/} See In the matter of American Telephone and Telegraph Co., 98 FCC 2d 943 (1984) ("Sales Agency Order").

^{29/} Id.

Otherwise, the telephone companies' marketing operations would be the source of "an important competitive advantage," creating the opportunity for abuses.^{30/}

Similarly, an OVS operator should be permitted to conduct any inbound telemarketing^{31/} or referrals of its video services only on the condition that it provides the same marketing on the same terms, conditions, and prices to all VPPs. The Commission should limit the inbound telemarketing or referral services provided by the OVS operator to a listing, on a rotating basis, of video programmers and cable operators, including the OVS operator's programming affiliate, that request such a listing service. To prevent the OVS operator from using its inbound telemarketing in a manner that disadvantages a video programmer or cable operator, the OVS operator should not be permitted to include any information about the price, terms, or conditions of service offered by any video programmer or cable operator, and should be prohibited from comparing among video programmers and cable operators, or among competing program offerings on its own OVS.^{32/}

To avoid the possibility that a LEC would use its monopoly-derived customer lists to gain an unfair advantage in the outbound telemarketing of unregulated services, moreover, the Commission should bar such telemarketing at least until the LEC can show that a

^{30/} Id. at 1142 (noting that "[m]ixing the marketing [of regulated and unregulated] products creates the potential for . . . the monopoly network provider's use of monopoly-derived revenues and its monopoly position to gain unfair leverage in unregulated markets.").

^{31/} "Inbound telemarketing" refers to telemarketing or referrals that occur during a call initiated by a customer or a potential customer of the service.

^{32/} These rules are analogous to the Commission's rules governing the joint marketing of local telephone service and customer premises equipment by LECs. See Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, 4 FCC Rcd 6537 (1989).

competing multichannel video programming distributor is engaged in the outbound joint marketing of local telephony and video services.

The Commission must also ensure that all video programmers on the OVS platform obtain access to the same customer information on a real time basis. Information regarding deployment should also be provided on a nondiscriminatory basis. Equal access to information about potential and actual subscribers is critical in promoting fairness on open video systems. Not only is such information necessary for billing, it is invaluable for marketing purposes. Information about potential end-user subscribers, as well as deployment plans and schedules, will allow programmers to assess the market and to advertise to those customers. OVS operators will certainly have access to that information.

3. Channel capacity must be measured fairly and allocated without prejudice

Congress directed the Commission to adopt regulation prohibiting an OVS operator and its affiliates from selecting more than one-third of its system capacity if demand for channels exceeds supply.^{33/} By setting this limit, Congress clearly sought to provide for a competitive environment among programmers on each individual open video system. This, in turn, would ensure that consumers receive the broadest possible array of program choices and offerings.

To ensure compliance with the statutory mandate, capacity must be assigned in a non-discriminatory manner.^{34/} For instance, given the technical differences between analog and

^{33/} 47 U.S.C. § 573(b)(1)(B).

^{34/} See NPRM at ¶ 16.

digital channels and the current lack of an installed base of digital boxes, it would be per se discriminatory to count both analog and digital "channels" together for purposes of determining and comparing available capacity. Rather, the Commission should require OVS operators to count only the total number of analog channels for purposes of ascertaining compliance with the statute. Where demand for analog channels exceeds supply, unaffiliated VPPs should be allowed to utilize twice the total number of analog channels made available by the OVS operator to affiliated VPPs. To avoid the possibility of discrimination, an OVS operator should not be allowed to prescribe minimum or maximum capacity for unaffiliated VPPs.

With respect to digital channels, TCI suggests a total bandwidth approach to determining available capacity. Digital compression increases system capacity by eliminating the transmission of redundant picture elements. The level of compression depends on the nature of programming being transmitted at any given time. In light of the constantly changing number of programs that can be transmitted at any given time using digital compression, defining each program as a "channel" would force constant re-calculation of OVS capacity.

TCI suggests instead that a "digital channel" should be defined as a unit of 6 MHz of bandwidth.^{35/} The total number of channels could thus be determined for purposes of comparing availability and allocation. This would ease comparison between affiliated and unaffiliated programmers. As with analog channels, though, the same limitation should

^{35/} This proposal is consistent with the definition of the term "cable channel," 47 U.S.C. § 522(4), and the definition of "television channel," 47 C.F.R. § 73.681.

apply: where demand for digital channels exceeds supply, unaffiliated programmers should be allowed to utilize twice the total number of digital channels made available by the OVS operator to affiliated programmers.^{36/}

4. The Commission must forbid discrimination with respect to channel allocation and positioning

In order to ensure that open video system operators allocate capacity on a non-discriminatory basis,^{37/} the Commission must adopt regulations setting forth the manner of selection of video programmers and allocation of capacity.

If open video systems are truly to be non-discriminatory and pro-competitive, the Commission must specifically require OVS operators to implement a channel reservation mechanism that:

- allocates channels to programmers in a fair manner based upon the video programmers' initial requests in the case of requests exceeding available capacity;
- sets forth procedures to decide how channel positions will be determined among video programmers;
- gives programmers a role in channel positioning decisions; and
- allows programmers to determine whether to use analog or digital capacity.

These guidelines are consistent with Congress' intent to provide a non-discriminatory framework while simultaneously reducing regulation.^{38/} The Commission's suggestion that

^{36/} Any determination of channel capacity for new technology, e.g., "switched video," should be postponed until the technology is better developed.

^{37/} See NPRM at ¶12.

^{38/} See Conference Report at 172, 178.

it could "simply prohibit[]" ^{39/} OVS operators from discriminating against unaffiliated programmers should be rejected. Such a rule would allow great leeway to discriminate against unaffiliated video programs, and unnecessarily postpone the carriage and allocation considerations that Congress determined were essential to promote fair competition.^{40/}

Furthermore, OVS operators should not be allowed to choose among programming providers entitled to carriage. Given the concern that programming distributors tend to favor affiliated programmers,^{41/} OVS operators should be subject to strict guidelines to prevent them from discriminating in the selection of VPPs or particular programming services. Such discrimination would result in fewer program offerings, reduced customer choice, and diminished competition. It would thus be directly contrary to the intent of Congress and the express purpose of the Act to allow OVS operators to preclude competing cable operators from obtaining capacity on their system.

5. Requiring all contracts with video programming providers to be public would help to protect against discrimination

To afford a meaningful opportunity to police the statutory non-discrimination requirements applicable to open video systems, the agreements under which video programming providers obtain capacity on an open video system should be available for

^{39/} NPRM at ¶12.

^{40/} Indeed, as the Commission learned in the video dialtone context, the allure of promulgating an abbreviated rule now is far outweighed by the costs of adjudicating disputes in an arena of uncertainty down the road.

^{41/} Channel occupancy limits and must-carry requirements imposed on cable operators, 47 U.S.C. §§ 533(f), 534 are earlier manifestations of this concern.

public review.^{42/} Full and open disclosure will help to ensure fair competition between OVS operators and other MVPDs in accordance with the intent of Congress and the provisions of the Act. The Commission's rules provide adequate protection for proprietary information.^{43/}

B. THE COMMISSION SHOULD REQUIRE SEPARATE SUBSIDIARIES TO GUARD AGAINST CROSS-SUBSIDIZATION AND ANTICOMPETITIVE CONDUCT

In order to deter cross-subsidization and anticompetitive conduct by local exchange carriers, the Commission should require LECs to operate their open video systems, and provide programming to subscribers, through an affiliate that is structurally separated from the LEC's regulated telephone operations. The separate affiliate would act independently of the telephone operating company; maintain separate books, records, and accounts; have separate officers, directors; and employees; obtain credit separately from the telephone operating company; and conducts all of its transactions with the operating company on an arm's-length basis, with any such transactions reduced to writing and available for public inspection.^{44/}

While structural separation does not by itself prevent unlawful activity, it has proven useful as a means of deterring such activity by highlighting the transactions between a

^{42/} NPRM at ¶ 34.

^{43/} See 47 C.F.R. § 0.457.

^{44/} Cf. 1996 Act, § 272(b) (to be codified at 47 U.S.C. § 272(b)) (requiring public disclosure of any transaction between a Bell operating company and its separate subsidiary).

regulated entity and its unregulated affiliate.^{45/} The Commission has long employed this tool to ensure that the entry of monopoly local exchange carriers into competitive markets does not impede competition.^{46/} In the case of OVS, arm's-length separation between the LEC's telephone operating company and its OVS affiliate and between the "wholesale" and "retail" OVS offerings of the LEC is essential in order to provide a meaningful opportunity to detect and police the many and varied anticompetitive activities that could arise.^{47/}

With respect to Bell operating companies ("BOCs"), a structural separation requirement for OVS is also compelled by the 1996 Act. Section 272(a)(2)(C) of the 1996 Act requires a BOC to establish a separate affiliate for interLATA information services.^{48/}

^{45/} See, e.g., In re Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communication Services by the Bell Operating Companies, 95 FCC 2d 1117, 1131 (1983), aff'd sub nom. Illinois Bell Tel. Co. v. FCC, 740 F.2d 465 (7th Cir. 1984), recon. den., 49 Fed. Reg. 26,056 (June 26, 1984), aff'd sub nom. North American Telephone Association v. FCC, 772 F.2d 1282 (7th Cir. 1985) (separate subsidiaries eliminate problem of determining proper allocation of joint costs and reduce likelihood of discrimination).

^{46/} See, e.g., First Computer Inquiry, 28 FCC 2d 291 (1970) (data processing services); Computer II Final Decision, 77 FCC 2d 384 (1980) (same); Cellular Communication Systems, 86 FCC 2d 469, 493 (1981) (cellular services).

^{47/} See Section II.A, supra.

^{48/} 47 U.S.C. § 272(b)(2)(C). The statute exempts from this requirement, inter alia, "incidental interLATA services" and "electronic publishing." §§ 272(b)(2)(B)(i), 272(b)(2)(C). Neither exemption is relevant here. Only "an interLATA transmission incidental to the provision by a [BOC] or its affiliate of video . . . services" is considered an "incidental" interLATA video service; the actual provision of service to the public is not an incidental service for purposes of section 271 or 272. See § 271(h). Likewise, the definition of electronic publishing specifically excludes "video programming or full motion video entertainment on demand." § 274(h)(2)(O).

Even assuming arguendo that the separate affiliate requirement does not apply to a BOC's offering of OVS, the Commission retains its authority to "prescribe safeguards"

(continued...)

"Information service" means "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."^{49/} The provision of video services to subscribers, whether over a cable system or otherwise, is an information service,^{50/} and the Commission has long held that the last-mile distribution of video programming is an interstate service.^{51/}

C. THE COMMISSION MUST ENFORCE ALL TITLE VI OBLIGATIONS THAT ARE MANDATED BY THE ACT

Congress provided that the Title VI obligations it set forth for OVS should impose no greater or lesser obligation than that imposed on cable operators.^{52/} In implementing these provisions, the Commission must ensure parity between cable and OVS operators.

1. OVS operators must independently comply with PEG, must-carry and retransmission consent obligations to the same extent as cable operators do

OVS operators are required by the explicit language of the Act to comply with Sections 611, 614 and 615 and Section 325 of Title III.^{53/} Cable operators must live under

^{48/} (...continued)

consistent with the public interest, convenience, and necessity. § 272(f)(3). The FCC's pre-1996 Act authority clearly included the power to require separate affiliates, which the Commission has done on a number of occasions. See n.46, supra.

^{49/} 47 U.S.C. § 153(41). This definition is drawn from the Modification of Final Judgment, § IV(J) ("MFJ"). See U.S. v. American Tel. & Telegraph Co., 552, F.Supp. 131 (D.D.C. 1982), aff'd. sub nom. Maryland v. U.S., 460 U.S. 1001 (1983).

^{50/} See, e.g., Pepper, Through the Looking Glass: Integrated Broadband Networks, Regulatory Policies, and Institutional Change, 4 FCC Rcd 1306, 1314-15 ¶ 72 (1988).

^{51/} See U.S. v. Southwestern Cable Co., 392 U.S. 157, 168 (1968).

^{52/} 47 U.S.C. § 573(c)(2)(A).

^{53/} § 573(c)(1).

these restrictions, and OVS operators have an independent statutory obligation to do so as well. Thus, it would be inequitable to permit an OVS operator to demand a cable operator's PEG channels either through an interconnect agreement or otherwise. OVS operators should be free to negotiate with cable systems to contract for the cable PEG channel feeds. In the event that arrangements cannot be reached between the parties, however, the OVS operator should be required separately to comply with the PEG requirements, as mandated by Congress.^{54/}

Likewise, the Commission's concern about the absence of a franchise requirement is misplaced.^{55/} Cable operators currently operate single systems that straddle multiple franchise areas and television markets, and must comply the requirements of all of the markets they reach. For example, TCI owns over thirty separate cable systems the headends of which encompass multiple ADIs -- in fact, one of these systems encompasses three ADIs. TCI must comply with all applicable Title VI requirements for these systems, and Congress expressly required OVS operators to bear the same burden.^{56/}

2. OVS Operators Must Fulfill Other Mandated Requirements

The Act requires that OVS operators comply with the Commission's regulations concerning sports exclusivity, network non-duplication, and syndicated exclusivity.^{57/} As in

^{54/} Where there is no incumbent, PEG obligations should be established as in the cable context. See NPRM at ¶ 57.

^{55/} See NPRM at ¶ 57

^{56/} See 47 U.S.C. § 573(c)(2)(A).

^{57/} 47 U.S.C. § 573(b)(1)(D). See 47 C.F.R. § 76.67 (sports exclusivity); 47 C.F.R. § 76.92 et seq. (network non-duplication); and 47 C.F.R. § 76.151 et seq. ("synd/ex").

the case of PEG and signal carriage requirements, the Commission's inquiry with respect to how these requirements can be implemented across multiple community units or relevant geographic zones^{58/} fails to recognize that cable operators already comply with the rules under such circumstances. TCI, for example, has single systems that cross state lines, serve different counties, different ADIs, and different thirty-five mile zones.^{59/} These systems are not exempt from the network non-duplication, synd/ex, and sports exclusivity rules, and they comply with those rules. In fact, LECs have the opportunity to design their systems around these problems rather than having to implement the rules via existing systems. There is no justification for according OVS operators better treatment than cable operators.

The Act also subjects OVS operators to the Commission's program access rules.^{60/} Thus, to the extent that they are vertically integrated with any programmer, OVS operators are precluded from engaging in unfair methods of competition or discriminating between competing MVPDs with respect to the sale or delivery of their programming.^{61/}

D. THE COMMISSION MUST IMPLEMENT MEANINGFUL CERTIFICATION REQUIREMENTS TO ENSURE THAT NON-DISCRIMINATION GOALS ARE MET

Given the extremely short period of time available to the Commission to approve or reject certifications submitted by OVS operators seeking exemption from Title VI regulation,

^{58/} See NPRM at ¶ 46.

^{59/} For example, one such system crosses the Illinois/Wisconsin state line, serves both McHenry and Walworth counties, the Chicago ADI and the Rockford, IL 35-mile zone.

^{60/} 47 U.S.C. § 573(c)(1)(A), incorporating § 548. See also 47 C.F.R. §§ 76.1001 et seq.

^{61/} The program access rules should not be interpreted to supplant the right of any programmer to request channel capacity on an OVS system or to determine the manner in which its program service is to be provided. Cf. NPRM at ¶ 41.

applicants should be held to a "letter perfect" standard, strictly enforced.^{62/} The Act provides that the Commission must render a decision whether to approve or deny a certification to become an open video system operator within ten days of receipt of such certification.^{63/} Such a short review period would be meaningless unless the process was structured to give as much opportunity for review and comment as possible -- unhindered by the delay accompanying edits or amendments to the certification.

By setting a high standard for speedy review of these certifications, Congress underscored the need for uniform, concise, and accurate filings. The Commission will not have time to review in detail every application in order to determine whether the relevant information is disclosed.^{64/} In order for the Commission to rule on certifications, "there can be no delay associated"^{65/} with having the staff examine each application. Both the number of applications as well as the need for expeditious processing dictate that a letter perfect standard be imposed. As a result, applicants should be required "to take full

^{62/} The Commission used a similar standard to evaluate applications for commercial mobile radio service lotteries. Cellular Lottery Proceeding, First Order on Reconsideration, 58 R.R. 2d 677, 696-97, (1985). Because numerous applications were filed in ways that made it difficult and time-consuming for the Commission's staff to search for germane information, the Commission streamlined the application intake and pre-screening process by imposing uniform and specific filing requirements. Failure to conform to this letter perfect standard constituted grounds for rejection of an application as unacceptable for filing. See also Cellular Applications for Unserved Areas, 6 FCC Rcd 6185 (1991) (unserved area applications are also subject to the letter perfect standard).

^{63/} 47 U.S.C. § 573(a)(1).

^{64/} See PacTel Mobile Access, 1 FCC Rcd 564 (1986) (rejecting PacTel's application for failure to comply with the letter perfect standard, the Commission stated that the "necessity to hunt through each application for relevant information was a major factor in the delay" of processing applications.)

^{65/} Id. at 565.

responsibility for the accuracy and completeness of their applications, while minimizing the need for [the] processing staff to spend valuable time"^{66/} reviewing applications.

In accordance with its prior practice, the Commission should strictly enforce the letter perfect standard.^{67/} The Commission should warn prospective applicants that applications failing to comply precisely with the filing requirements will be dismissed.^{68/} Given the need for expeditious action on certification filings, a letter perfect standard is the best mechanism for the Commission to accomplish its goals.

III. THE PUBLIC INTEREST IN ROBUST VIDEO COMPETITION WILL BE SERVED BY PERMITTING NON-LOCAL EXCHANGE CARRIERS TO OPERATE AND UTILIZE OPEN VIDEO SYSTEMS TO PROVIDE A BROAD RANGE OF SERVICES

In order to promote the Congressional objective that open video systems introduce vigorous competition into entertainment and information markets,^{69/} entities that are not LECs must be allowed to operate their own open video systems and obtain access to open video systems as video programmers. Not only did Congress envision that open video systems would provide an alternative regulatory scheme for cable operators to provide video

^{66/} Id.

^{67/} The Commission has previously rejected applications for failure to comply with the letter perfect standard, regardless of the nature of the error. See e.g., Id. at 564; C.J. Communications, 1 FCC Rcd 739 (1986) (any application that causes a delay in processing must be rejected); Southwestern Bell Mobile Systems, Inc., 61 R.R. 2d 254 (1986) (no exceptions for typographical errors); Sun Communications, Inc., 4 FCC Rcd 6429 (1989) (unsigned certifications render applications unacceptable for filing).

^{68/} See PacTel Mobile Access, 1 FCC Rcd at 565.

^{69/} Conference Report at 178.

programming, but allowing non-LECs to offer OVS will promote regulatory parity among providers and thereby foster competition and consumer choice in the video marketplace.^{70/}

A. CONGRESS CONTEMPLATED THAT CABLE OPERATORS COULD BECOME OPEN VIDEO SYSTEM OPERATORS

The 1996 Act states that "an operator of a cable system or any other person may provide video programming through an open video system."^{71/} The plain language of the 1996 Act, and its attendant emphasis on fostering competition, affords the Commission ample latitude to allow cable operators to become open video system operators.

The plain language of the statute permits cable operators to "provide video programming through an open video system that complies with this section."^{72/} There is no evidence that Congress intended to prevent cable operators from offering services on an open video system. Congress could have expressly stated that cable operators shall not be allowed to operate open video systems, but it chose not to. Rather, Congress indicated its broad support for enhanced competition.

Congress enacted Section 653 of the Communications Act to promote competition in the video marketplace and thereby "meet the unique competitive and consumer needs of individual markets."^{73/} Permitting cable operators or other persons to offer services in this manner, by offering an outlet for unaffiliated video program providers, would significantly further this goal by allowing cable operators to use their significant experience in the video

^{70/} NPRM at ¶ 64.

^{71/} 47 U.S.C. § 573(a)(1).

^{72/} Id.

^{73/} Conference Report at 177.